

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KAREN C. ROLES)	
Claimant)	
VS.)	
)	Docket No. 270,077
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Both claimant and respondent appeal the October 30, 2006 Award of Administrative Law Judge Thomas Klein. Claimant was awarded benefits for a permanent total disability after the Administrative Law Judge (ALJ) determined that claimant suffered a new chemical exposure through her last day worked on July 16, 2001 *[sic]*.¹ The Appeals Board (Board) heard oral argument on January 19, 2007.

APPEARANCES

Claimant appeared by her attorney, Michael L. Snider of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award of the Administrative Law Judge (ALJ). The Board makes the following corrections to the ALJ's recitation of the record. The deposition of Diana Pike, listed as taken on August 11, 2002, was actually dated March 11, 2002. The deposition of Felix A. Sosa, M.D., listed as taken on January 19, 2005, was actually taken on January 30, 2004. The Board also

¹ Claimant's last day was July 18, 2001. (R.H. Trans. (Nov. 14, 2005) at 3.)

considered both depositions of Daniel C. Doornbos, M.D., taken January 9, 2006, and continued on February 6, 2006.

ISSUES

Claimant raises the following issues for the Board's consideration:

1. Is claimant entitled to payment of past, present and future medical expenses?
2. Is respondent liable for payment of medical bills for claimant's respiratory symptoms?

Respondent raises the following issues for the Board's consideration:

3. Should this claim be denied due to claimant's failure to prove accidental injury or occupational disease arising out of and in the course of her employment during the dates alleged in 2000 and 2001?
4. Should claimant's claim be denied because claimant's symptoms experienced in the years 2000 and 2001 were a natural and probable consequence of her preexisting conditions and not from any exposure to chemicals at respondent?

If claimant gets past the threshold compensability issues, respondent raises the following secondary issues for the Board's consideration:

5. Did claimant's disability result from an accidental injury or occupational disease?
6. What is the date of accidental injury or occupational disease?
7. If occupational disease, did disablement result within one year of the last injurious exposure?
8. Has claimant proven that her past and current outstanding medical expenses are causally related to the accidental injury/occupational disease claim, and whether the claimed medical expenses are/were reasonable and necessary for the treatment of her alleged accidental injury or occupational disease?

9. Is claimant entitled to temporary total disability as previously ordered by the Board, and what is the extent of any additional temporary total disability?
10. What is the nature and extent of claimant's disability, including but not limited to claimant's entitlement to temporary versus permanent disability, the amount of compensation due, and whether claimant can receive more than one permanent total disability compensation award?
11. Is respondent entitled to an offset for a preexisting condition under K.S.A. 44-501(c) if this is an accidental injury or an apportionment of disability under K.S.A. 44-5a01(d) if this is an occupational disease?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified.

Claimant commenced working for the respondent on January 21, 1975. At the time of claimant's preliminary hearing testimony before the ALJ on February 5, 2002, claimant was on a medical leave of absence from respondent with a last day worked of July 18, 2001.

Claimant has a long history of respiratory problems while working for respondent starting in 1978. In 1979, claimant was diagnosed with bronchiectasis. Surgery was required and Dr. Conception of Wichita, Kansas, performed a left lower lobectomy.

After the left lung operation, claimant required numerous additional medical treatments through emergency room visits and hospital admissions for continuing respiratory problems through the 1980s.

In 1990, because of claimant's continuing respiratory problem, she went on her own to the National Jewish Medical and Research Center (National Jewish Center) located in Denver, Colorado. The National Jewish Center is considered by many to be the nation's leading treatment center for respiratory diseases and immune disorders.

Claimant was first examined and evaluated at the National Jewish Center in December 1990 with a history of asthma being diagnosed since 1978. The National Jewish Center physicians examined the claimant and diagnosed her with bronchiectasis and various modalities of treatment were prescribed.

Claimant returned to the National Jewish Center in July 1991. At that time, claimant gave a history of returning to work for respondent in January 1991, after returning home to Wichita from the National Jewish Center in December 1990. Shortly after claimant returned to work, claimant was again hospitalized for severe respiratory symptoms. Claimant saw Joseph Jarvis, M.D., at the National Jewish Center during the July 1991 visit. He reviewed Material Safety Data Sheets of several different chemical substances that claimant was exposed to while she was employed by respondent.

Dr. Jarvis' assessment was that claimant's history was compatible with occupation-related exacerbation of her asthma condition. He opined that claimant's symptoms would very likely worsen from exposure to many of the substances contained in the Material Safety Data Sheets claimant had supplied. The doctor also opined that claimant's initial symptoms and problems with asthma could be caused by workplace exposures. Dr. Jarvis could not design appropriate equipment to protect claimant from the chemical exposure and recommended she seriously consider finding alternative employment.

In 1991, claimant was taken off work because of her continuing severe respiratory problems and she did not return to work until five years later on May 10, 1996. During that period of time, claimant was treated primarily by board certified allergist/immunologist Maurice Henry Van Strickland, M.D., pulmonologist Daniel C. Doornbos, M.D., and board certified internal medicine specialist Roberta L. Loeffler, M.D.

Claimant made a claim for workers compensation benefits, alleging chemically induced asthma. On February 22, 1995, claimant settled her workers compensation claim with respondent before ALJ Shannon S. Krysl. As of the date of the settlement, claimant had received \$63,494 representing 228 weeks of temporary total disability benefits. Respondent had also paid medical expenses in the amount of \$76,680.34. At the settlement hearing, respondent denied the compensability of the claim and claimant relinquished her rights to review and modification of the settlement award and the right to future medical treatment. Claimant received, as a strict compromise of those issues, an additional lump sum settlement in the amount of \$61,500.

During the time claimant was off work and was treated for her asthma condition, her respiratory problems improved. On December 21, 1995, Dr. Strickland opined that claimant's pulmonary disease had stabilized. He released claimant to work in a smoke free, chemical odor free environment at a desk job or a job not involving physical labor.

Claimant contacted respondent and the respondent returned claimant to work on May 10, 1996, as a lead person in Industrial Park Building-three (IPB-3). The working environment that claimant returned to was clean and air conditioned.

Respondent's Active Medical Recommendations/Qualifications sheets showed as of March 14, 1996, that claimant was restricted to work in a smoke free and chemical odor free environment. In 1998, additional restrictions were noted of no work in areas with irritant fumes; must work in air conditioning; and no work in areas with skin irritants without protective equipment.

In 1997, respondent moved claimant to a different area of IPB-3 that exposed claimant to chemicals contained in cleaning solvents and fumes from mini riveters. In the latter part of 2000, respondent then moved claimant to Industrial Park Building-One (IPB-1). That building was not air conditioned and was more crowded with workers and machines.

Commencing in 1999, claimant started developing upper respiratory problems with irritation in her throat and upper chest area instead of her previous symptoms which had centered in her lung area. On January 26, 1999, Dr. Doornbos had claimant undergo a flexible fiberoptic bronchoscopy diagnostic procedure because, as a result of his observations of claimant over a period of months, he suspected claimant had a vocal cord dysfunction. Dr. Doornbos' findings from the bronchoscopy procedure confirmed the presence of vocal cord dysfunction which at least partially mimics asthma.

After the bronchoscopy procedure, claimant again went to National Jewish Center for treatment in June 1999. This time, she was evaluated for possible vocal cord dysfunction. Claimant's complaints on that visit were more in her throat and upper respiratory area compared to her previous complaints involving her lungs. The National Jewish Center also had the results of the January 1999 bronchoscopy procedure that demonstrated vocal cord dysfunction.

During the June 1999 visit, claimant was examined and evaluated at the National Jewish Center by Ronald Balkissoon, M.D., Occupational and Pulmonary Medicine Staff Physician. His impression was that claimant likely had some component of irritant-induced vocal cord dysfunction along with asthma, gastroesophageal reflux and rhinosinusitis.

Dr. Doornbos, in his September 28, 2000 medical note, stated that he found claimant with a markedly hoarse voice and a fair amount of stridor as well as expiratory laryngeal wheezing. His assessment was that, although the claimant does have asthma, the majority of her current problems really relate more to her vocal cord spasms than the asthma itself. The doctor said that severe vocal cord spasms will actually obstruct the airway leading to near respiratory failure. Claimant also made the complaint to Dr. Doornbos that she was having difficulty with the environmental conditions while working at respondent. She requested that Dr. Doornbos restrict her from working around chemical fumes and that she needed an air-conditioned workspace. Dr. Doornbos wrote out a release for those work restrictions, but also felt that claimant should not be exposed to any chemicals and it would, therefore, be to her benefit to be off work entirely.

On Monday, July 16, 2001, claimant returned to work from a medical leave of absence related to a carpal tunnel release surgery. Claimant had been off work since June 30, 2001. Claimant worked July 16, 17, and 18, 2001.

Claimant testified that on July 18, she again started having breathing problems. Because of her breathing problems, claimant carried portable oxygen equipment as prescribed by Dr. Doornbos. Claimant testified that when she returned to work those three days in July, she experienced exposure to chemical fumes and graphite dust. That exposure caused her throat to close and she could not get enough air.

On July 19, claimant still was having breathing problems and called and notified respondent that she was not able to return to work that day. Claimant also was unable to return to work on Friday, July 20.

On Saturday morning, July 21, claimant experienced an acute respiratory attack at home and was taken to the hospital by ambulance. Claimant was admitted to the hospital and required intubation and was placed on a mechanical ventilator to assist her breathing. Claimant was given aerosol bronchodilators and IV steroids. Claimant improved and was extubulated and taken off the ventilator. She was discharged on July 27, 2001.

On August 4, 2001, claimant was again admitted to the hospital with marked respiratory distress. She was seen by her treating physician, Dr. Doornbos. His impression was severe vocal cord dysfunction with multiple recent severe episodes of upper airway obstruction and bronchial asthma of unclear severity. Claimant was treated with a helium-oxygen mixture and aerosol treatments. Dr. Doornbos also opined that claimant needed a tracheostomy surgery to enable her to open her breathing pathway when she was experiencing an acute respiratory attack. Claimant was discharged on August 13, 2001.

Also during the August 4, 2001 hospitalization, claimant had tracheostomy surgery where a tube was inserted to relieve obstruction of the airway and facilitate breathing. Claimant was discharged on August 13, 2001, but she was again admitted into the hospital from August 17, 2001, through August 23, 2001, with acute respiratory problems.

Claimant returned to the hospital emergency room on August 28, 2001, with complaints of cough, shortness of breath, and no improvement following breathing treatments. Dr. Doornbos examined claimant in the hospital and his impression was severe vocal cord dysfunction, status post-tracheostomy but still symptomatic.

At the February 5, 2002 preliminary hearing, claimant testified that her respiratory problems she suffered in 1991 through 1995 involved her lungs. But presently her problems involve her throat.

Claimant's treating physician, pulmonologist Dr. Doornbos, wrote claimant's attorney a letter dated November 26, 2001, concerning claimant's current medical status and condition.

Dr. Doornbos opined, "She has asthma, which has been for many years, slowly worsening, partly as a result of ongoing exposure to chemicals at work. . . ." ² He went on to opine that claimant's breathing has gradually worsened to the point where she is barely able to function on a daily basis. At work, claimant over uses her voice and her symptoms could be worsening as a result of her continuing chemical exposure at work. Claimant is presently not able to work and she should never work again around any chemical fumes which is unavoidable while working for respondent.

In a letter dated February 7, 2002, Roberta L. Loeffler, M.D., wrote to claimant's attorney and opined, "I believe that exposure to solvents, chemicals, and other airborne pollutants aggravated [the] respiratory disease in this patient. . . ." The doctor concluded, "I think it is unlikely that Karen is currently able to return to work under any circumstances due to the degree of her disability secondary to her chronic lung disease." ³

Marsha Olson, one of claimant's co-workers, testified at the January 10, 2002 preliminary hearing. Ms. Olson worked with claimant first in IPB-3 and then worked with claimant in IPB-1, after she was transferred with claimant in the first part of 2001. IPB-3 was air conditioned and climate controlled. In contrast, IPB-1 was not air conditioned and the work environment contained chemical fumes and dust. Ms. Olson testified that after claimant was transferred to IPB-1 she observed that claimant's breathing problems increased because of the chemical exposure.

Ms. Olson testified that from 1997 to 1998, claimant was doing well in the air-conditioned climate-controlled facility building small parts, and that there were no chemical fumes claimant was exposed to during 1997 or 1998. Later, after moving to another building that did not have air conditioning, claimant began having a lot more trouble breathing. During 2001, Ms. Olson worked 6 feet away from claimant. Ms. Olson was using paint, solvents and sealers, and the materials they worked on and drilled would produce black graphite dust that smelled terrible. ⁴ Ms. Olson testified that she observed claimant having more and more difficulty breathing her last day of work at Boeing on or about Wednesday, July 18, 2001. Claimant was not able to come to work on Thursday or Friday of that week. When Ms. Olson talked to claimant on Thursday and Friday night, claimant was having problems breathing and she could hear claimant wheezing on the

² P.H. Trans. (Jan. 10, 2002), Cl. Ex. 1.

³ This letter is attached to claimant's March 22, 2002 submission letter to the ALJ and is marked Exhibit D.

⁴ P.H. Trans. (Jan. 10, 2002) at 17-20.

phone. Early Saturday morning, claimant's daughter called Ms. Olson, and she went to claimant's house. Ms. Olson called an ambulance after arriving at claimant's house, because claimant was barely breathing. Claimant was admitted to the hospital.⁵

Diana L. Pike, a 17-year veteran employee of respondent, testified that she also worked in IPB-3 and then was transferred to IPB-1. Ms. Pike started having breathing problems about a year after she transferred into IPB-1. She experienced breathing problems as a result of her exposure to the cleaning solvent MPK. The Material Safety Data Sheet for MPK indicates that MPK may cause respiratory irritation. The Material Safety Data Sheet also indicated that certain medical conditions such as asthma, bronchitis and other preexisting respiratory disorders may be aggravated by exposure to MPK.

As a result of Ms. Pike being allergic to MPK, she now works at all times with a hooded respirator. Ms. Pike also testified that claimant was exposed to MPK because claimant was the lead person and had to work around the mini riveters when parts were soaked in this cleaning solution.

Philip G. Green, claimant's supervisor while she was employed in building IPB-1, testified in this case on behalf of the respondent. He knew that claimant had breathing problems but did not know she had restrictions against working in an environment exposed to chemicals. Mr. Green testified claimant never complained to him about excessive fumes or graphite dust in the work area. Air quality tests were also taken in claimant's work area and Mr. Green testified that they showed no over exposure. Mr. Green also knew that MPK could irritate a person's respiratory system.

Mr. Green was aware that claimant had to leave work on occasion because of her breathing difficulties. Mr. Green acknowledged that he noticed the claimant demonstrated breathing difficulties by wheezing and a hoarse voice.

At respondent's insurance company's request, claimant was examined and evaluated January 23, 2002, by occupational medicine physician Allen J. Parmet, M.D. Dr. Parmet reported his findings in a report dated February 12, 2002. Before claimant's examination, Dr. Parmet was provided various medical records and reports of doctors who had examined and treated claimant for her ongoing respiratory problems. Dr. Parmet reviewed those medical records, took a history from the claimant and conducted a physical examination of claimant.

Dr. Parmet diagnosed claimant with (1) severe vocal cord dysfunction causing pseudo asthma, (2) severe controlled asthma, (3) status post surgical carpal tunnel right

⁵ *Id.* at 27-32.

hand release, (4) gastroesophageal reflux and hiatus hernia, status post endoscopic Nissen application, and (5) status post cataract extraction and intraocular lense placement.

Dr. Parmet determined that claimant's vocal cord dysfunction was not related to her work environment. He opined that the etiology of the condition was idiopathic, but the gastroesophageal reflux was a major contributing factor. The doctor also concluded there is no direct toxicologic *[sic]* cause for the vocal cord dysfunction condition. The doctor further concluded that claimant's asthma condition was contributed to by her work-related chemical exposure as well as the gastroesophageal reflux. Dr. Parmet found the asthma condition was stable and effectively unchanged over the past 10 years.

Dr. Parmet evaluated claimant a second time, at the request of respondent, on December 21, 2004. Dr. Parmet's diagnosis remained the same as in 2002, with the exception that he now found claimant to suffer from major depression, chronic recurrent, with psychotic episodes. Dr. Parmet determined that claimant was permanently and totally disabled, in part due to claimant's work-related occupational asthma (which he rated at 51 percent to the body as a whole), in part, due to her non-work-related bronchiectasis (which he rated at 10 percent to the body as a whole), and the remainder to her non-work-related vocal cord dysfunction. His ratings were pursuant to the fourth edition of the *AMA Guides*.⁶ Dr. Parmet testified that claimant was a Class IV under the *AMA Guides*, but went on to state that claimant had been a Class IV since 1993 or 1994. He stated that claimant's preexisting condition, in and of itself, was sufficient, as a natural and probable course of her life, to cause the asthma symptoms and claimant's other symptoms regardless of the environment that claimant was living in in 2000 and 2001. Dr. Parmet also testified that when Dr. Strickland modified claimant's restrictions in 1995, which allowed claimant to return to work for respondent in 1996, the modifications were not realistic. Dr. Parmet acknowledged that from 1991 to 1996, claimant's condition did stabilize, but determined that claimant was not better.

Dr. Parmet did not believe that claimant's exposure to substances at work included an exposure to isocyanates. Dr. Parmet determined that claimant was not around aromatic hydrocarbons, although he agreed claimant was around ketones, specifically MPK and MEK. On cross-examination, he agreed that respondent did use paints that could release isocyanates and toluene, which is commonly used by respondent and is an aromatic hydrocarbon.

Dr. Doornbos provided the court a letter dated June 9, 2004, in which he conceded that some of claimant's lung disease had, in the past, been contributed to by chemical exposures at respondent. However, he went on to state that claimant's ongoing worsening of her lung disease over the previous 4 years was not due to a new injury suffered by exposures to chemicals with respondent, but rather due to the ongoing outworking of her

⁶ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

severe asthma and bronchiectasis and also probably due to claimant's ongoing acid aspiration with progressive lung deterioration. Dr. Doornbos did testify that claimant's chances of maintaining even a reasonable semblance of health when exposed to noxious fumes on a regular basis would be almost nil. He stated that no exposure to irritant chemicals does an asthmatic any good, whether the chemical be Barsol 11-7, MPK, cigarette smoke in a bar or diesel fumes in traffic. No inhaled irritant would be good for claimant. He conceded that if claimant was being exposed to such irritants, it certainly could have a negative effect on her breathing. Dr. Doornbos also acknowledged that, in 1994, when he repeated the pulmonary function tests on claimant, her FEV-1 had increased 163 percent, which he described as a huge positive improvement.

In late April 2003, claimant moved to Florida. She was first examined by board certified internal medicine specialist Felix A. Sosa, M.D., on May 19, 2003. Dr. Sosa diagnosed claimant with interstitial lung disease (ILD). He described this as scarring of her lungs from chemical exposure. Dr. Sosa stated this condition was permanent, claimant would not get better, and ultimately claimant would need a lung transplant. He was provided a Material Safety Data Sheet pertaining to Barsol A-2904, which he stated contained hydrocarbons. Dr. Sosa testified that hydrocarbon is a textbook chemical risk for ILD. Dr. Sosa testified that claimant is permanently disabled as a result of her multiple occupational exposures to the chemicals at respondent's facility.

Claimant returned to Dr. Strickland on June 21, 2005, at the request of her attorney. Dr. Strickland initially treated claimant from February 11, 1991, through March 19, 1998, and had, early on, recommended that claimant leave respondent's aircraft plant because he thought her work exposure was making her asthma worse. When claimant asked Dr. Strickland in 1995 for permission to return to work with respondent, which she did in 1996, he told her that she could not go back into that environment because of the chemicals and irritants. Claimant advised that she could get an office job with air conditioning, no smoke, solvent or chemical exposure, and that she would be able to avoid irritants and paint. When claimant returned to respondent, she did well the first few years. Her asthma was being controlled. However, according to Dr. Strickland's review of the records, claimant's worsening condition was connected to the move to an environment where claimant was exposed to chemicals. Dr. Strickland also noted that claimant's respiratory system findings in 2005 were different from what he noted from 1995 to 1998. The differences he noticed were the ground-glass opacities, ILD and subpleural nodules. The diagnosis of ILD was new, and claimant's lung damage was worse. He reviewed a CT scan taken at Wesley Medical Center on June 21, 2005. The radiologist's report described fibrosis with some ground-glass opacity in the right upper lobe. Dr. Strickland, who reviewed the actual CT scan, noted that claimant had terrible scarring and damage to her lungs. He also opined that this type of fibrosis is very consistent with the exposures that claimant had with respondent. He testified that 75 percent of claimant's current condition is due to claimant's second time working with respondent. Dr. Strickland went on to say that claimant is permanently and totally disabled, and has been so since her last date of employment with respondent.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁹

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."¹⁰

It is apparent from this record that, whether claimant sustained an injury by accident or suffered an occupational disease, claimant is permanently and totally disabled from any type of employment. The medical opinions of several health care providers confirm claimant's disability. Additionally, the parties stipulated to a pre-injury wage in this matter of \$1,130.28, including regular time and overtime, but not including fringe benefits.¹¹

The Board must determine whether claimant's condition is the result of a new accidental injury or occupational disease, and whether the condition was caused or contributed to by claimant's employment with respondent through 2001, is a natural result

⁷ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁹ K.S.A. 44-501(a).

¹⁰ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹¹ See *Slack v. Thies Development Corp.*, 11 Kan. App. 2d 204, 718 P.2d 310, rev. denied 239 Kan. 628 (1986).

of claimant's earlier employment before her return to work in 1996 or is the result of personal conditions suffered by claimant stemming from GERD.

K.S.A. 44-5a01(b) lists the elements of a compensable occupational disease. An "occupational disease",

. . . shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases. . . .¹²

Evidence describing the exposure of a claimant to the disease-causing substances can satisfy a claimant's burden of proof. In *Box*,¹³ the claimant became disabled from a pulmonary condition, which the Kansas Supreme Court ruled was compensable. The claimant in *Box* worked in an area where the air was often heavy with paints, lacquers, thinners, solvents and other chemicals, which were being sprayed. The air was described as "sometimes foggy".¹⁴ The testimony indicated that polyurethane, enamel and lacquer paints and ketone thinners were used. The court found ample substantial evidence that claimant was engaged in an occupation or employment which exposed him to a "special risk, a special and peculiar hazard of the disease from which the trial court found he suffers."¹⁵

Exposure to the types of chemicals encountered by this claimant while performing her job with respondent does not happen in the ordinary course of life to the general public. Claimant's occupation exposed her to a special risk or a peculiar hazard of the disease from which she suffers. The Board finds it significant that this claimant was exposed to some of the same chemicals as encountered by the claimant in *Box*.

¹² K.S.A. 44-5a01(b).

¹³ *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

¹⁴ *Id.* at 244.

¹⁵ *Id.*

Expert medical testimony regarding causation is relevant to establish a compensable occupational disease.¹⁶ Dr. Strickland and Dr. Sosa found a direct connection between claimant's conditions and the chemicals to which she was exposed while working with respondent. Even Dr. Doornbos acknowledged that claimant's exposure to the specific chemicals, Barsol 11-7 and MPK, would have a negative effect on her breathing.¹⁷ The Board finds that claimant suffered an occupational disease arising out of her employment with respondent. The Board also finds the appropriate date of accident is the last day claimant was exposed to the chemicals with respondent, i.e. July 18, 2001. It was on this date that claimant became incapacitated from performing her duties for respondent as a result of these exposures.¹⁸ The Board finds the ALJ's use of July 16, 2001, as the date of accident to be error.

Respondent argues that claimant's claim is barred because her condition stems from her earlier work exposures and is a natural consequence of those exposures. Claimant settled the claim regarding those work exposures in 1995. That argument fails. Testing performed in 1994 showed that claimant's condition had improved. Dr. Doornbos found claimant's lung capacity to have improved by 163 percent.¹⁹ Claimant was able to return to work with respondent and did so successfully for over two years before she began to develop additional problems. So long as respondent was willing to meet Dr. Doornbos' restrictions (which the doctor provided reluctantly) and allow claimant to work in a clean environment, claimant was able to perform her job duties without any apparent worsening of her condition. It was not until claimant was moved to a different area and was once again exposed to chemical irritants that her condition began to deteriorate.

Dr. Parmet testified that claimant's current problems stem from her earlier exposures, with the current conditions being a natural consequence of those earlier injuries. He denies any connection between claimant's current problems and her exposures to chemicals with respondent in 2000 and 2001. Part of his reasoning stems from his belief that claimant had no chemical exposure that caused her symptoms. However, the testimony of claimant, Ms. Olson and Ms. Pike contradict those beliefs.

Additionally, Dr. Loeffler, Dr. Sosa, Dr. Doornbos and Dr. Strickland agreed that exposure by claimant to the chemicals in question would aggravate her condition. Both Dr. Strickland and Dr. Sosa found claimant's condition to have progressively worsened by 2005. Dr. Sosa found claimant to suffer from ILD as a result of her ongoing exposures to the chemicals at respondent's plant. Dr. Sosa connected the ILD to the exposures to

¹⁶ *Weimer v. Sauder Tank Co.*, 184 Kan. 422, 337 P.2d 672 (1959).

¹⁷ Doornbos Depo. (Jan. 9, 2006, & Feb. 6, 2006) at 182-183.

¹⁸ K.S.A. 44-5a04(a); K.S.A. 44-5a06.

¹⁹ Doornbos Depo. (Jan. 9, 2006, & Feb. 6, 2006) at 144.

hydrocarbons, which he testified is a textbook known chemical risk for ILD. Dr. Strickland, after reviewing CT scans of claimant's lungs from 2005 and comparing them to scans from 1995 to 1998, found a worsening. This worsening included fibrosis and "ground-glass opacities, interstitial lung disease, subpleural nodules".²⁰ He considered this to be evidence of significant lung damage. Dr. Strickland described claimant's lungs as being terribly scarred and damaged. He testified that this type of fibrosis is very consistent with the exposures claimant had with respondent. The Board acknowledges that claimant had a significant preexisting condition from her original employment with respondent. However, the evidence supports claimant's claim that she first experienced an improvement in her condition and then suffered a worsening of her condition as a result of her return to work and continued employment through July 18, 2001. With regard to claimant's preexisting injuries, the Board was as unimpressed with the opinion of vocational expert Karen Terrill, as was the ALJ.

Respondent also argues that claimant's ongoing problems are the result of GERD, a non-work-related gastroesophageal condition. However, Dr. Parmet, when finding claimant permanently and totally disabled, concluded that her work-related asthma deserved a 51 percent whole body functional rating. He does attribute a portion of claimant's functional impairment to the GERD and to non-work-related bronchiectasis. However, as the Board has already found claimant's preexisting condition to have been permanently aggravated as a result of claimant's return to work through 2000 and 2001, any partial involvement of the GERD or bronchiectasis would not make this occupational disease non-compensable. While respondent may argue that claimant's exposure to chemicals at work is not solely responsible for claimant's disability, no apportionment is proper where a disease producing a single disability is caused by both occupational and nonoccupational factors.²¹ In *Burton*, claimant was exposed to dirt, dust and chemicals from 1955 until January 7, 1991. During this time, the claimant also smoked one pack of unfiltered cigarettes a day for over thirty years. The claimant was ultimately diagnosed with adult-onset asthma superimposed on mild obstructive airways disease. The Kansas Supreme Court, in *Burton*, analyzed K.S.A. 44-5a01(d) (Ensley 1986) which states:

Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears on all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under

²⁰ Strickland Depo. at 17.

²¹ *Burton v. Rockwell International*, 266 Kan. 1, 967 P.2d 290 (1998).

the circumstances of the particular case may be for the best interest of the claimant or claimants.²²

The court determined that this provision related to the apportionment of a disability award under two different situations: (1) where a preexisting occupational disease is aggravated by any disease which is not compensable; and (2) where a disability which is not compensable is aggravated in some manner by an occupational disease.²³ The court determined that if the legislature desired apportionment in all cases of a disease producing a single disability, it would have done so with clear language. The court determined that K.S.A. 44-5a01(d) (Ensley 1986) does not require apportionment where a disease producing a single disability is caused by both occupational and nonoccupational factors. Based on this holding, the Board finds in this case that while claimant's disability has both occupational and nonoccupational causes, there will be no apportionment of the disability.

The Board has already determined the appropriate date of accident in this matter is the date claimant became incapacitated by the occupational disease from performing her work for respondent. That date will be the appropriate date from which the issues of timely notice and timely written claim will be determined. K.S.A. 44-5a17 requires written notice of an occupational disease within ninety (90) days after disablement. Respondent acknowledged that an accident date in 2000 to 2001 would be within the statute of limitations time period.²⁴ As the Board has found a date of accident of July 18, 2001, and claimant's written notice in this matter was submitted on September 11, 2001,²⁵ respondent's argument on these issues fails.

Respondent disputes that claimant's disablement from the occupational disease resulted within one year of the last injurious exposure to the occupational disease.²⁶ Dr. Strickland testified that claimant was permanently and totally disabled since her last day of work with respondent.²⁷ The Board finds claimant has met the requirements of K.S.A. 44-5a01(c).

²² K.S.A. 44-5a01(d) (Ensley 1986).

²³ *Burton, supra*, at 4.

²⁴ Respondent and Insurance Carrier's Final Award Submission Argument Brief (filed May 12, 2006) at 5.

²⁵ R.H. Trans., Cl. Ex. 2.

²⁶ K.S.A. 44-5a01(c).

²⁷ Strickland Depo. at 26-27.

Respondent disputes claimant's entitlement to temporary total disability, yet provides no new evidence. The Board finds that the 103 weeks of temporary total disability paid through July 9, 2003, was appropriate. The Board affirms the earlier award of temporary total disability benefits.

Respondent disputes claimant's entitlement to past and current medical benefits. The Award of the ALJ fails to discuss these issues, even though respondent raised the issues at the regular hearing²⁸ with the admission of an exhibit²⁹ showing a total paid for past medical treatment to be \$106,339.65³⁰ and memorialized the disputed issues in respondent's submission letter, dated May 12, 2006, filed with the Kansas Division of Workers Compensation on May 12, 2006. Respondent disputes that claimant has carried her burden of proof of entitlement to payment of specific medical bills, whether the incurred medical bills are related to any chemical exposure, and more specifically, whether the bills were reasonable and necessary to cure and relieve claimant from the effects of her injuries suffered while in respondent's employment.³¹ The Board is limited under K.S.A. 2006 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge. As the ALJ failed to address these issues in the Award, a remand of this matter to the ALJ for a determination of these medically related issues is necessary. The Board, therefore, remands this matter to the ALJ for a determination of the necessity and reasonableness of the medically related expenses as claimed in this matter and based on the exhibits and evidence contained in this record.

Claimant alleges entitlement to unauthorized medical treatment pursuant to K.S.A. 44-510h(b)(2), but provides no justification for the claimed benefit. Respondent objects and appeals claimant's entitlement to the unauthorized medical reimbursement, but provides no factual argument in opposition. The ALJ awarded claimant unauthorized medical "up to the statutory maximum" with no further explanation. The Board finds claimant entitled to the unauthorized medical benefit, but only upon presentation of an itemized statement verifying same, and only upon compliance with the provisions of K.S.A. 44-510h(b)(2).

K.S.A. 44-501(h) states:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any

²⁸ R.H. Trans. (Nov. 14, 2005) at 16-18.

²⁹ R.H. Trans. (Nov. 14, 2005), Resp. Ex. 6.

³⁰ R.H. Trans. (Nov. 14, 2005) at 6 and Resp. Ex. 6.

³¹ K.S.A. 44-510h.

compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.³²

It has been stipulated by the parties that claimant began receiving \$282.27 per week effective March 1, 2004, as a retirement benefit provided by respondent. There is no dispute that respondent is entitled to an offset against claimant's weekly workers compensation benefits in this amount effective March 1, 2004, and thereafter.

What is in dispute herein is the manner of calculating a retirement benefit credit when the retirement benefit is a disbursement in a lump sum. The parties agree that claimant cashed in a VIP 401(k) plan on July 24, 2003, which paid claimant a lump sum of \$52,109.64. Respondent argues that the lump sum should be spread over the maximum number of weeks available under a permanent total award, which respondent's brief to the Board indicates calculates to a weekly offset of \$173.83, after computing a maximum of 299.76 weeks of available benefits in a permanent total disability award with a weekly benefit of \$417.

While the Board does not find fault with respondent's math, the Board does disagree with the proposed method of calculating the weekly offset. In *Lleras*,³³ the Board was asked to consider this very issue. In *Lleras*, the claimant introduced a mortality table from the Pattern Instructions Kansas 3d (PIK). The Board, in adopting the claimant's proposed method of calculating the weekly benefit offset amount, was persuaded that the claimant's retirement benefits were intended to last him a lifetime. Therefore, the lump sum in *Lleras* was converted to a weekly equivalent amount by dividing the lump sum amount by claimant's estimated life expectancy.

The PIK mortality table was also stipulated into the record in this matter. However, respondent argues claimant cannot use the mortality table in this situation. Respondent points out that this claimant's life expectancy is significantly limited and for claimant to argue on the one hand that her life expectancy is greatly limited due to the severe injuries suffered while claimant worked for respondent and then argue the appropriate use of the PIK mortality table disingenuous. Respondent goes so far as to argue that the principles of equitable estoppel should prohibit claimant from taking such inconsistent positions. The

³² K.S.A. 44-501(h).

³³ *Lleras v. Via Christi Regional Medical Center*, No. 5,008,471, 2005 WL 3665502 (Kan. WCAB Dec. 22, 2005.)

Board disagrees with respondent's position. While claimant may be significantly injured in this matter, there is no opinion from any health care provider as to the expected length of claimant's life. The Board is persuaded by claimant's argument that claimant's retirement benefits were intended to last her a lifetime. Without specific medical information verifying that claimant's diagnosed conditions have limited her life expectancy, the PIK mortality table is the only evidence upon which the Board can make a determination. Consequently, the lump sum will be converted to a weekly equivalent amount by dividing the lump sum amount by claimant's estimated life expectancy. As of the date claimant was paid the lump sum amount, on July 24, 2003, claimant was 54 years old. This computes to a life expectancy of 28.7 years or 1,492.40 weeks. Dividing the lump sum amount of \$52,109.64 by 1,492.40 weeks calculates to a weekly offset of \$34.92, effective July 24, 2003, the date the lump sum was paid claimant.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated October 30, 2006, should be, and is hereby, modified with regard to claimant's date of accident, the retirement credit and the determination regarding claimant's entitlement to past and current medical care and the amount of temporary total disability compensation paid, but affirmed in all other regards. An award is granted in favor of the claimant, Karen C. Roles, and against the respondent, The Boeing Company, and its insurance carrier, Insurance Company of the State of Pennsylvania, for accidental injury which occurred on July 18, 2001, and based upon a permanent total disability. Claimant is entitled to receive the following benefits:

For the period from July 19, 2001, through July 9, 2003, claimant is entitled to 103.00 weeks of temporary total disability compensation at the rate of \$417.00 per week totaling \$42,951.00.³⁴

For the period from July 10, 2003, through July 23, 2003, claimant is entitled to receive 2.0 weeks of permanent total disability compensation at the rate \$417.00 per week totaling \$834.00.

For the period from July 24, 2003, through February 29, 2004, through December 31, 2004, claimant is entitled to 31.57 weeks of permanent total disability compensation at the rate of \$382.08 per week (\$417.00 minus the \$34.92 offset) totaling \$12,062.27.

³⁴ According to the itemization of TTD paid, claimant was paid TTD totaling \$42,951.00, for the period 7/19/01 through 7/10/03. (See R.H. Trans., Resp. Ex. 5.) However, \$42,951.00 divided by \$417.00 equals a period of 103.00 weeks. (7/19/01 through 7/9/03 equals a period of 103.00 weeks.)

Beginning March 1, 2004, claimant is entitled to permanent total disability compensation at the rate of \$99.81 per week (\$417.00 minus the \$34.92 offset and minus the \$282.27 offset) until fully paid or until further order of the Director.

As of April 2, 2007, there would be due and owing to the claimant 103.0 weeks of temporary total disability compensation at the rate of \$417.00 per week in the sum of \$42,951.00, plus 2.0 weeks of permanent total disability compensation at the rate of \$417.00 per week or \$834.00, plus 31.57 weeks of permanent total disability compensation at the rate of \$382.08 or \$12,062.27, plus 161.14 weeks of permanent total disability compensation at the rate of \$99.81 or \$16,083.38, for a total due and owing of \$71,930.65, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of the permanent total disability in the amount of \$53,069.35 shall be paid at the rate of \$99.81 per week until fully paid or until further order of the Director.

The Board remands this matter to the Administrative Law Judge for a determination of claimant's entitlement to past and current medical benefits.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge